IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 191 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VISHNUPRASAD P PATEL... Appellant.

Versus

MAGANBHAI D SHAH.....Respondents.

Appearance:

Ms. Trusha Patel for Mr. A.J. Patel for the Appellants.

Mr. S.B. Vakil for the Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 15/12/2000

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 30th June 1982 passed by the then learned 2nd Extra Assistant Judge, Vadodara, in Regular Civil Appeal No. 283 of 1979, allowing the appeal and reversing the decree dated 3rd May 1979 passed by the then learned 2nd Joint Civil Judge (SD), Vadodara in Regular Civil Suit No. 1512 of 1978 whereby the suit was decreed and it was ordered to construct the wall with a direction to the parties to bear the expenses equally as well as

restraining the respondents from obstructing the appellant from constructing the wall and allow the appellants, their workers, labourers, masons and others to go through the respondents' premises for the purpose of constructing the wall, the original-plaintiffs have preferred this appeal.

2. Necessary facts, leading the present appellant, to prefer the present appeal may be stated. In the City of Baroda there is a house bearing M.S. No. B/4861 the City Survey number of which is 108 and Sanad number is 26074. The said property belongs to the present appellants (original-plaintiffs). The respondents were the tenants of some of the portion of that property i.e.,godown. The shop is East to West in length and North to South in width. Touching the western wall of the shop godown portion is situated having the length from North to South. The length of the godown is 21 feet 4 inches, while the width of the shop is 10 feet. To the South of the shop and half of the eastern side of the godown towards South, there is an open space. The shop is let to the Tractor Trading Company. While selling the godown to the respondent it was agreed that a wall in between the open space and the godown which is on the Southern side of the shop would be constructed sharing the expenses equally. Such agreement was recorded in the sale deed executed and produced on record at Exhibit 17. Prior to the sale of godown whenever appellant wanted to go to the open space towards the South of the shop let to Tractor Trading Company he used to go through the godown now sold to the respondent. For the purpose of constructing the wall he will have to go to the sight through the godown. The appellant after the sale was effected, asked the respondent to construct the wall and pay half of the cost which he was bound to pay under the agreement but the respondents paid no heed and did not allow the appellants to construct the wall. The workers and labourers, masons employed for the construction of the wall were also not permitted to pass through the godown. The appellants were therefore constrained to prefer Regular Civil Suit No. 1512 of 1970 in the Court of the Civil Judge (SD), Vadodara, for an injunctive relief restraining the respondents from obstructing them while constructing the common wall in between the godown and the open land and also from obstructing his contractor, masons, workers, labourers from passing through the godown for the purpose of constructing the wall, etc.

3. On being served with the summons, the respondents appeared before the trial Court and filed their written

statement at Exhibit 7 denying every allegation levelled against them and contending further that they are the tenants of the open land which is situated to the South of the shop and Eastern side of the godown and as such they are in possession. If the wall in question is constructed, they would not be able to go to the open land for the purpose of using and occupying the same and they would be deprived of their tenancy rights. Just to get the possession of the open land devicefully a case about the construction of the wall was engineered. The appellants were having no right to pass through the godown they have purchased, and never the appellants were passing through even prior to the sale of the godown. On the Western border of the godown, the wall standing was in dilapidated condition. The Municipal Corporation of Vadodara therefore got the same pulled down, with the result the godown was then made open to all sundries. In order to protect the goods stored in the godown the respondents had to again construct a wall at that place immediately for which the appellants had agreed to pay half of the cost. When he demanded the amounts the appellants had to pay, the suit with some ulterior motive when filed was liable to be dismissed.

4. On the above pleadings of the parties, the then learned Civil Judge (SD) to whom the suit was assigned framed the issues at Exhibit 9. The learned 2nd Joint Civil Judge held that the suit in the present form was maintainable. The wall was to be constructed jointly by the parties and the appellants had a right to pass through the godown. The appellants, were, therefore, entitled to the injunctive relief sought for. He also held that the respondents failed to establish their tenancy right over the land situated to the South of the shop and East of the godown. He then on 3rd May 1979 passed the decree as prayed for. Being aggrieved by the judgment and decree of the trial Court, the respondents who were the original-defendants preferred Regular Civil Appeal No. 283 of 1979 in the District Court at Vadodara which was later on assigned to the then learned Extra Assistant Judge, Vadodara, who hearing the parties on 30th June 1982 allowed the appeal, set aside the judgment and decree passed by the trial Court and dismissed the suit. The appellants, who are the original-plaintiffs when failed in appeal decided to challenge the judgment and decree; with the result, the present appeal is filed.

5. In view of Section 100 of Civil Procedure Code, while admitting the appeal, following substantial questions of law were framed;

(A) Whether the findings of the learned Appellate Judge on the right of appellants of constructing partition wall are perverse, looking at the plain language of sale deed Ex.17.

(B) Whether under given facts and circumstances the learned Appellate Judge committed an error apparent on the face of record, as both the sides agree to the condition set out in sale deed ex.17.

6. It is submitted by the learned advocate representing the appellants that the learned 2nd Extra Assistant Judge who heard the appeal drew unjust & improper conclusions because he did not consider the evidence on record. On the basis of the inferences and conjectures and also on the basis of the erroneous interpretation of the sale deed, Exhibit 17, opinion is formed and conclusions are drawn. If two views from the materials on record are possible, the appellate Court cannot take the different view than the view already taken by the trial Court unless ofcourse there is a cogent reason to take a different view or it appears from the record that the trial Court arbitrarily or perversely appreciating the evidence took the erroneous view. In short, it is the contention that overlooking the evidence on record and by faulty construction of the sale deed Exhibit 17, the lower appellate Court gave finding in favour of the respondents and dismissed the suit. If the document is not correctly interpreted, it would be the substantial question of law and this Court can enter into the merits of that question and decide the appeal. In support of her such contentions, she has drawn my attention to some of the decisions. In the case of Bindeshwari Rai Vs. Ram Palak Singh - AIR 1938 Patna 181, it is held that the first appellate Court is the final court on the question of fact and is entitled to draw such inferences from the facts on record as it thinks proper and in Second Appeal, there is no power in the High Court to interfere with the finding but when the appellate court on the slenderest evidence makes out a case which is not in the pleadings, its finding on fact cannot be binding in the Second Appeal. In the case on hand, according to the learned advocate the lower appellate Court made out a new case which was not at all pleaded and it was with regard to tenancy of the land in question. She further argues that if the document of title or the document on which the right claimed is founded is to be construed, the question of construction

would certainly be the question of law and for such contention, reliance is placed on the decision of the Supreme Court rendered in the case of Sir Chunilal V. Mehta and Sons Ltd Vs. Century Spinning and Manufacturing Co.Ltd. - AIR 1962 SC 1314. If the approach of the lower Court is found unwarranted and finding is based on improper interpretation of document and overlooking the weight of the evidence, it would be a ground to interfere with the same in Second Appeal and that is what is made clear by this Court in the case of Balvantrai Chhabildas Mehta Vs. State Bank of Saurashtra - 1998 (2) G.L.H. 204. The finding based on appreciation of evidence cannot be reversed in appeal unless the reason as to how it is wrong is assigned, is the principle made clear by the Orissa High Court in the case of Santanu Kumar Das and Others Vs. Bairagi Charan Das and Others - AIR 1995 Orissa 300. In the case on hand, when on the basis of the inferences and conjectures the appellate Court has taken a different view, it would be just and proper on my part to interfere with a finding is the submission and for that reliance is placed on this decision. Lastly, reliance is placed on a decision of the Calcutta High Court rendered in the case of Sri Bhadreswar Pandit and others Vs. Smt. Puspa Rani Pandit = AIR 1991 Calcutta 405, wherein it is held that when the finding is based on no evidence or non-consideration of proper evidence or omission to consider entire evidence, it would be a ground to interfere in Second Appeal and that would fall within the scope of Section 100 of Civil Procedure Code. The principle about the interference in Second Appeal made clear is in my view beyond any doubt, but whether the decisions cited can be pressed into the services of the appellants is the point that arises for consideration. If the relevant evidence is not considered which if considered would have led to an opposite conclusion or the lower appellate Court has given the finding placing reliance on inadmissible evidence which if was not done, an opposite conclusion was possible, this Court can interfere holding that the same is a substantial question of law.

7. Whether the open land to the South of the shop and to the East of the godown is in possession of the respondents and that too as a tenant is the point discussed by the lower appellate Court. Even if for a while it is believed that the same is erroneous or not warranted by the evidence on record, the appellants cannot succeed submitting in that regard basing their contentions on the above said authorities because that is not the gist of the matter or the pivotal issue. Incidentally observations are made but for the same

substantial question for determination is not framed. The issue regarding the tenancy is an incidental issue in the suit and effective and efficacious finding can be given by the Rent Court under the Rent Act as the dispute about the tenancy is in constroversy. The parties may if they so choose resort to necessary proceeding before competent forum. Looking to the case pleaded in the plaint and above said prayer sought for, the moot question raised in the case is whether appellants have a right to go to the place where wall is to be constructed through the godown portion sold to the respondents and at present in possession of the respondents and whether lower courts have committed any error in that regard. It may be stated that as per the Sale Deed Exhibit 17 executed, while selling the godown portion, it is agreed that the wall in question will be constructed at the joint expenses and every one will have to bear the expenses equally but how to construct the wall and when to construct the wall is not made clear in the document, Exhibit 17. The question how to construct & when to construct is not the main question involved, as stated above right to go to the place where the wall is sought to be constructed is the pith & substance of the matter. Whether in that regard, the lower appellate Court has erroneously constructed or interpreted the Sale Deed Ex.17 has to be examined in this appeal being the substantial question of law and that is what can be spelt out when the above said two substantial questions are examined.

8. When with meticulous care and finicky details the document Exhibit 17 is perused, it is pertinent to note that the same is silent on the point of a right to go to the godown and pass and repass through the godown for the purpose of constructing the wall. When the document itself is silent with regards to the right in question, finding if given to the effect that appellants have a right they are claiming, it would amount to perverse and arbitrary interpretation or construction or it would amount to misreading the document. The lower appellate Court has found that the document is silent regarding the right claimed and so reversed the finding of the trial Court. If that is so, the finding of the lower appellate Court cannot be held bad as canvassed and cannot be interfered with in Second Appeal. Ofcourse, the lower Court has given the finding regarding the possession of the disputed land and has also assigned the reasons which may to an extent extraneous, but that will not be a ground to interfere with the findings because the conclusion drawn remains the same and that too on the ground that the document, i.e., Sale Deed Exhibit 17 is

silent on the right claimed and on that point, it cannot be said that the conclusion drawn is arbitrary or perverse. At the cost of repetition, it may be stated that the reasons assigned for the same may not be palatable but those reasons cannot give a ground to interfere with the ultimate conclusion drawn which is just and proper having regard to the contents of the documents in question. With regards to the interpretation of document (Ex.17) and oral evidence in that regard, no two views are possible, and findings given cannot be said to be the findings on no evidence or the result of omission to consider the evidence on record or perverse interpretation of evidence or inferences & conjectures leading to miscarriage of justice. The decisions cited are of no help to the appellants.

9. For the aforesaid reasons, the finding regarding the right claimed is found just and proper. The lower appellate Court has not erroneously interpreted the document (Exhibit 17). On other questions of fact, even if the finding is erroneous, I cannot in view of Section 100, Civil Procedure Code, interfere with the same. In the result, there is no reason to upset the finding allowing the appeal. The appeal fails and is dismissed with no order as to costs.

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